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ABSTRACT

Federal court decisions and federal statutes have established a number of new rights for individuals in recent years, and the Supreme Court decided in 1975 that school board members have only limited immunity from liability for the possible denial of those rights by school board actions. These two developments have drastically increased the amount of litigation faced by board members. The federal doctrine of limited immunity states essentially that officials are not immune if they "knew or reasonably should have known" that their actions would deprive individuals of their rights or if the actions were malicious, though the degree of immunity guaranteed board members may be changed by the Supreme Court. To avoid liability in federal court actions and in state negligence and libel suits as well, boards should follow due process, move with caution in matters of censorship and maternity leave, seek advice of counsel in advance, state at the outset all the grounds relied on in dismissal cases, show evidence of good faith, decide early whether to demand a jury, and seek passage of laws authorizing liability insurance. This booklet also discusses jury trials, damage awards, and vicarious liability as they relate to board member liability. (Author/PGD)

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Legal Liability of Individual School Board Members

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. . . about the NSBA Council of School Attorneys

Under the aegis of the National School Boards Association, the Council of School Attorneys was organized in 1969 to provide a national forum on the practical legal problems faced by local public school districts and the attorneys who serve them. In this way, the Council works to promote closer relationships among school attorneys, client school boards and state associations of local school boards. The Council has more than 1000 active members, with representatives from almost every state and the District of Columbia.

Membership in the Council is open to attorneys at law who are licensed to practice before the highest court of any state of the U.S. or before a court of record of the U.S.; and who are (or have been within the immediate past 2 years) attorneys for a local public school district, a state association of local school boards or any public junior or community college. The entire membership of any state council of school attorneys sponsored or recognized by a state association of local boards affiliated with NSBA may secure integrated membership with the Council.

For more information about the NSBA Council of School Attorneys, its publications, programs and membership, call or write NSBA, 1055 Thomas Jefferson St., NW, Washington, D.C. 20007 (202-337-7666).

Legal Liability of Individual School Board Members

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FOREWORD

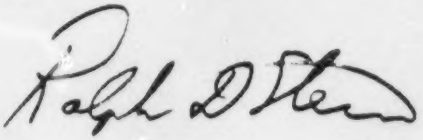
NSBA's Council of School Attorneys introduces this primer on *Legal Liability of Individual School Board Members* for the use of both attorneys and school board members.

As the author notes in his opening paragraph, "school board membership is a hazardous business." In times past school board members could devote themselves exclusively to educational concerns such as curriculum, testing etc. Today they need a law degree and a prophesier to assure they are not treading on some newly discovered constitutional right of the school district's teachers or students. Furthermore, as a result of recent court decisions, the individual assets of school board members are now in jeopardy, making the task of managing the schools even more precarious.

This publication will provide to both attorneys and school board members a quick historical reference on the state of the law in this area and some pointers for avoiding school board member liability.

The author, E. Freeman Leverett, is one of the most respected school lawyers in Georgia. He practices law with the Elberton, Georgia, firm of Heard, Leverett & Adams. Mr. Leverett is also General Counsel for the Georgia School Boards Association and sits on the Board of Directors of the NSBA Council of School Attorneys.

We offer *Legal Liability of Individual School Board Members* to board members and their counsel in hopes of easing the burden imposed by the law on board members, so that more time can be devoted to the ultimate goal of providing a high quality education to every public school student.



Ralph D. Stern
Chairman
NSBA Council of School Attorneys

LEGAL LIABILITY OF INDIVIDUAL SCHOOL BOARD MEMBERS

THE PROBLEM

School board membership is a hazardous business. Personal judgments impacting upon the individual resources of board members are now commonplace. To an even greater extent, board members have had to bear the trouble, worry and legal expense of defending many groundless suits without any reasonable hope of reimbursement after the Court has vindicated their actions. Even granted that personal liability is rejected in most cases, this does not alter the fact that this usually cannot be determined until after the parties have gone through a full-scale trial, often involving several years of court hearings, depositions, trials and incalculable expense and inconvenience.

Twenty-five years ago, law suits seeking recovery against the individual resources of school board members were virtually unheard of. This rather sudden change of circumstances is due principally to two legal developments.

First, the delineation of an entirely new horde of federal constitutional rights through decisions of the federal courts, such as teacher dismissal and non renewal, student suspension, campus First Amendment rights, and maternity leave to name only a few. Added to this has been a flurry of statutory enactments from Congress, such as Title VII (FEPC), Title VI, and more recently, Section 504 of the Rehabilitation Act, 20 USC 794, and the Education for All Handicapped Children Act of 1975, 20 USC 1401, the parameters of which yet remain to be fully defined in the damages field. Some courts have even recognized a new action, educational malpractice,[1] under which the potential for personal liability is staggering. It also appears that we may be on the threshold of a development of a new federal common law of constitutional negligence.[2]

Second, a decision of the United States Supreme Court in 1975,[3] although upholding a limited immunity for school officials, has nevertheless served to focus attention on the fact that school board members *may* be liable, and has thereby served as a stimulus for claims based on the newly-evolved federal rights.

In short, there has been litigation defining both the *right* and the *remedy*, and given the current propensity of Americans to sue, the sudden rash of litigation against school board members hardly comes as a surprise.

BACKGROUND

The personal liability of school board members, and public officials in general, is not new. At common law, personal immunity of public officials and employees did not exist,[4] despite the equally well-settled rule of sovereign immunity. While the Crown was not vicariously liable for the wrongful acts of his servants, the servants were nevertheless liable for their own acts under the rule of the law of agency which says that an agent is liable for his own wrongful acts.[5]

The proposition was never stated so strongly as in Lord Mansfield's decision in *Mostyn v. Fabrigas*:[6]

> "Therefore to lay down in an English court of Justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the great seal, is accountable only to God and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained."

But because it was the judges who declared what the law was, it was not surprising to find that at an early date, they carved out an exception for themselves, and established the doctrine of judicial immunity.[7] Under this exception, judges enjoy an absolute immunity for their acts, even when the judge acts erroneously, maliciously, corruptly, or in excess of jurisdiction. It is only where a judge acts "in the clear absence of all jurisdiction" that he loses his immunity.[8] The same immunity is extended to prosecuting attorneys.[9]

The rationale for the immunity is that it exists "not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."[10]

In due course, particularly in the federal system, the Courts came to recognize that the same considerations are applicable to public officials other than judges, and consequently, a principle of limited or qualified immunity began to emerge. In general, the test was stated in terms of "acting in good faith and with probable cause."[11] Although in one case the Supreme Court applied a rule of absolute immunity to a high executive official in the federal government sued for libel,[12] in a more recent decision of 1978, the Court declared that "in a suit for damages arising from unconstitutional actions, federal executive officials exercising discretion are entitled only to the qualified immunity . . . subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business."[13]

THE FEDERAL DOCTRINE OF LIMITED IMMUNITY AS APPLIED TO STATE OFFICIALS

Individual Liability

Following the Civil War, the Fourteenth Amendment was ratified as a limitation upon the powers of state officials, and Congress passed a number of civil rights statutes the very purpose of which was to establish both civil and criminal liability of state officials for wrongful invasion of the federal statutory and constitutional rights of citizens. See 42 USC 1983, 1985, et seq. Notwithstanding, the doctrine of immunity was still applied to state legislators by the United States Supreme Court in the 1951 decision in *Tenney v. Brandhove.*[14] Later decisions applied absolute immunity under the civil rights statutes to state court judges[15] and state prosecuting attorneys.[16] The first definitive decision of the Court regarding the immunity of state executive officials came in *Scheuer v. Rhodes,*[17] which involved suits for damages against the Governor, Adjutant General and other officers and enlisted members of the Ohio National Guard, for wrongful death and injuries with respect to students involved in the 1970 civil disorders at Kent State University. In this case, the Court rejected a claim of absolute immunity, even on the part of the Governor of a State, and held that,

> " . . . [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."[18]

The leading case, of course, and the case that established the current definition of qualified immunity, is *Wood v. Strickland.*[19] In that case, two 16 year-old students had "spiked the punch" at a school-sponsored function, and at a meeting of the Board of Education, they were expelled from school for the remainder of the semester, a period of 3 months. Notice of charges and opportunity to present a defense were not provided beforehand, although the board did hold another meeting two weeks later at which the girls, their parents and their counsel appeared and discussed the matter. An action for damages was brought under the civil rights statute, 42 USC 1983, against the members of the school board, two school administrators, and the district.

The district court granted a directed verdict for the board members on the ground that they were immune absent proof of malice in the sense of ill will. The Court of Appeals reversed, holding that there was no evidence supporting the expulsion, based on its interpretation of the school regulation relied on for the board's action. The Supreme Court granted certiorari, and disapproved the findings of no evidence by the Court of Appeals in strong language, declaring:

> "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public high school students do have substantive and procedural rights while at school. • • • But §1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this nation relies necessarily upon the discretion and judgment of school administrators and school board members, and §1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees." (420 U.S. at 326).

With respect to the immunity issue, the Court stated the test in these terms:

> "Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are 'charged with predicting the future course of constitutional law.' *Pierson v. Ray*, 386 US, at 557, 18 L Ed 2d 288. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." (420 U.S. at 322)

Because the lower courts had not considered the procedural due process issue, the judgment was vacated and the case sent back for consideration of this issue.[20]

Test for Establishing Immunity

Three years later in *Procunier v. Navarette*,[21] the Supreme Court pointed out that the *Wood* case established a two-part test. The first is objective, and the second is subjective.[22]

First – Objective Test

The objective part of the test itself is composed of three components: (1) Was the constitutional right infringed by the state officials clearly established at the time? (2) Did the defendants know of the right or should they have known thereof? and (3) Did they know or should they have known that their conduct violated the constitutional norm?[23] In reading many of the cases since that time, one gets the definite impression that the lower federal courts have tended to overlook (2) and (3), and give consideration only to (1), i.e., was the constitutional right clearly established?[24]

Second – Subjective Test

The second branch of the *Wood* test, the subjective part, is concerned with whether the defendent acted with malicious intention to deprive the plaintiff of a constitutional right or to cause him injury. While the first branch almost always will be a question of law, the second will usually be a question of fact, requiring a trial on the merits, as it involves the state of the defendant's mind. This second part of the *Wood* doctrine necessarily excludes negligence,[25] although the Fifth Circuit has held that acts which, although were not done with an intention to harm, were so likely to do injury that the harm can be characterized as substantially certain to result, will pierce the immunity defense.[26]

Subsequent lower federal court decisions applying the *Wood* immunity principles have held that the burden is on the defendant to prove the facts establishing immunity,[27] except in cases involving suits against prison officials, in which the burden is on the plaintiff to negate the defense.[28] The burden of pleading immunity is on the official claiming it, and the plaintiff does not have to plead facts showing that immunity is not applicable.[29] The Fifth Circuit has held that the immunity defense varies according to the scope of the officials' discretion and responsibility,[30] and that good faith is no defense to a suit brought under §1983 for false imprisonment, since the defense applies only where the official's functions involve discretion.[31] One court held that the good faith part of the privilege also does not apply in student search and seizure cases.[32]

LIABILITY OF BOARD ITSELF

To be distinguished from *individual* board member liability, is the entirely separate and distinct problem of *official* board liability, which is "only another way of pleading an action against an entity of which an officer is an agent."[33]

Originally, municipalities and other similar public bodies were not considered "persons" within the meaning of the federal civil rights statute most frequently relied upon by plaintiffs suing school boards, 42 USC 1983, under the 1961 decision of the Supreme Court in *Monroe v. Pape*,[34] with the result that such public bodies enjoyed immunity from damages thereunder. In *Monell v. New York City Department of Social Services*,[35] however, *Monroe v. Pape* was overruled in part. The Court in *Monell* held that municipalities and other public bodies were subject to liability under §1983 where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." The Court made clear, however, that a municipality would not be liable solely because it employs a wrongdoer.[36] When a public body is subject to liability under the test established in the *Monell* decision, it cannot assert an immunity based on the good faith of its officers as a defense, similar to what the officers themselves might assert when they are sued individually.[37]

A decision of the Supreme Court announced June 25, 1980, *State of Maine v. Thiboutot*,[38] has substantially broadened the potential liability of state officials under the civil rights statute, 42 USC 1983. In this case, the Court held that the statute encompasses claims based on purely statutory violations of federal law, and that coverage of §1983 is not limited to claims based on constitutional rights or laws providing for equal rights, as had been previously assumed by many attorneys. Consequently, the section can be used to support such non-civil right statutory claims as those arising under the AFDC benefit provisions of the social security law, as well as many other federal statutes, some 28 of which were set forth in an appendix to Mr. Justice Powell's dissenting opinion. This result is somewhat surprising, especially since it results in Section 1983 giving rise to some federal causes of action which do not fall within the jurisdiction of the federal courts to consider, because of the reason that the jurisdictional statute, 28 USC 1343 (3), is limited to cases involving rights secured by the "constitution . . . or any act of Congress providing for equal rights of citizens or of all persons . . ." In such claims as these, the plaintiff must sue in state court on his federal claim, unless the $10,000 jurisdictional amount of the general federal question jurisdictional statute, 28 USC 1331, is satisfied. Also, another anomolous development is that §1983 does not apply to federal officials, thereby encouraging plaintiffs to concentrate on state defendants even in cases where joint federal-state action is involved, as is usually the case in federal grant situations.

The Court also held that the Civil Rights Attorneys Fees Act of 1976, 42 USC 1988, is equally applicable to all Section 1983 actions, whether brought in state or federal court.

In *Maher v. Gagne,*[39] decided the same day, the Court held that attorney's fees could be awarded under §1988 where the plaintiff prevailed through a settlement rather than a trial, and that an award of attorney's fees against a state under §1988 was not barred by the Eleventh Amendment. The Court did not decide, however, whether a federal court could award fees against a state based on a statutory, non-civil rights claim.

THE IMMUNITY DOCTRINE APPLIED

A number of interesting cases have applied the immunity doctrine.

In *Guerra v. Roma School District,*[40] the board non-renewed the contracts of two teachers, and issued only one-year probationary contracts to two others. The evidence showed that this was in retaliation for these teachers having supported an unsuccessful candidate in the school board election. Consequently, the board action was in violation of the teacher's First Amendment rights of free association. Despite the fact that the board action was taken prior to the Supreme Court decision in *Elrod v. Burns,*[41] holding patronage dismissals unconstitutional, the federal court here reasoned that limited immunity might have protected the defendants here were it not for the fact that teachers have always been treated differently from other public employees, even before the *Elrod* case.

The remand of *Wood v. Strickland* itself indicates how close some of the questions may be upon which immunity depends. The Court of Appeals reasoned that the students were denied due process in that they were not given notice of the time and place of the meeting at which the suspensions took place, nor a copy of the charges, and although a hearing was held two weeks later at which the students did appear, this was not sufficient, as the board merely ratified its earlier action.[42]

In *Stoddard v. School District of Lincoln County,*[43] a verdict of $33,000 in compensatory damages was awarded to a teacher in her suit against the members of the Board of Education for refusing to renew her contract. The evidence showed that the reasons given to the teacher were not the real ones underlying the non-renewal, but rather the teacher's size, her failure to attend church, the location of her trailer and her personal life.

In *Schiff v. Williams,*[44] the Court upheld an award of compensatory damages against the president of a university for discharging the student editors of the college newspaper for having published materials deemed improper by the president. The Court held that this exercise of direct control over a college newspaper violated the First Amendment, and the award of damages was not barred merely because the president acted in good faith on the belief that his action served the best interests of the school, for immunity does not apply where "basic unquestioned constitutional rights" are violated.

In *Eckerd v. Indian River School District,*[45] the Court found that plaintiff's dismissal for insubordination was violative of his First Amendment rights in that it was based on his expressing his disagreement with the board on such things as attendance of the band at rescheduled football games, grading policies and practices, and involvement of band members in the full panoply of musical activities. These subjects were of the type over which plaintiff had particular responsibility, and were in response to critical remarks of him by his principal. The board presented no evidence that plaintiff's conduct adversely affected his classroom performance; the remarks were expressed privately and although disagreeing with the principal's directives, plaintiff nevertheless complied with them. There also was no close working relationship between teacher and principal which was undermined. Three of the defendants carried their burden on one aspect of the *Wood* immunity rule by testifying that they harbored no ill will toward plaintiff, and reached their conclusions solely on the evidence presented at the hearing. This was sufficient on the subjective aspect of *Wood,* but on the objective aspect—knowledge of clearly established constitutional rights, these defendants fail. The board members did not even discuss the First Amendment or the balancing test of *Pickering.* A question to the attorney as to "whether the dismissal would stand up in federal court" cannot be considered as the clear cut, reasoned type of reliance on an attorney's advice which will accord immunity.

In *M. M. v. Anker,*[46] the district court had set aside a verdict for the defendant school officials, and entered judgment for plaintiffs on the question of liability in a case for damages brought on the ground that plaintiff students had been subjected to an unreasonable search. The district court referred to the fact that defendants had no information that anything had been stolen, but proceeded to search plaintiff because of the fact that plaintiff M. had been in theft-suspicious situations before; that she was in a classroom where she was not supposed to be, with another child's

pocket book under her control, claiming the bag as her own; that she was taking down posters in the classroom to use to decorate her sister's room, and that upon being searched she attempted to refuse access to one object, which appeared to be a marijuana pipe. These facts do not constitute reasonable grounds for a search, although they might afford a basis for other disciplinary action. Subjective good faith is not sufficient under the 4th Amendment. The contention that defendents should be afforded a good faith defense because of the uncertainties of the law is rejected, as the defendants were familiar with the reasonable suspicion standard, and should have known that their conduct was unconstitutional within the meaning of *Wood v. Strickland.*

In *Zoll v. Eastern Allamakee School District,*[47] the Court upheld a jury verdict finding that the non-renewal of plaintiff's teaching contract was to retaliate for her having written letters to the newspapers criticizing her principal and superintendent. The lower court was upheld in awarding back pay against the principal and superintendent up to the date of trial, and in ordering that plaintiff be reinstated by being offered the first vacancy for which she is qualified. However, the back pay award generally should continue until such time as reinstatement is had, as against the wrongdoers.

In *Bertot v. School District of Laramie,*[48] the Court of Appeals upheld a jury finding that defendent school officials were entitled to immunity with respect to a claim by a teacher who had been non-renewed in violation of his constitutional rights, based upon his having encouraged students in their operation of an underground newspaper, contrary to the wishes of the principal. The Court reasoned that at the time of the non-renewal, court decisions had not clearly established that such conduct by the teachers was constitutionally protected, the decision in *Papish v. University of Missouri,* 410 U.S. 667 (1973) having not then been decided.

TO WHAT DAMAGES ARE SCHOOL BOARD MEMBERS SUBJECT?

In an action under 42 USC 1983, both compensatory and punitive damages are recoverable. Compensatory damages may include damages for mental and emotional distress without proof of actual damage.[49] Back pay may be granted for a period beginning with dismissal and extending up to the date of reinstatement.[50] Recovery may, in appropriate cases, include compensation for damage to character and reputation.[51] The award may also include

attorney's fees,[52] (which very often exceed all other damages). In federal court actions, under §1983, recovery cannot be had for injury to name or reputation alone, unaccompanied by dismissal or non-renewal.[53] In student suspension cases, actual injury must be shown; where the suspensions are seen to have been in fact justified, recovery cannot be had for the days lost from school, but only for distress caused from knowledge that due process was denied, and if such distress cannot in fact be proven, only nominal damages can be recovered.[54]

In addition to 42 USC 1983, Title IX confers a private cause of action.[55] It is not clear at this time as to whether Title VI,[56] or the Rehabilitation Act,[57] also confer a private cause of action. The Education for All Handicapped Children Act authorizes actions by aggrieved persons under 20 USC 1416 (e) (2).

JURY TRIAL

In an action for damages, generally a jury trial is guaranteed under the Seventh Amendment, and the right to a jury trial in damage actions under §1983 is clearly established.[58] It is not clear whether a right of jury trial exists with respect to a case where the only monetary relief sought is back pay, sometimes referred to as part of the equitable remedy of reinstatement. Under Title VII, the right does not exist.[59] With respect to actions seeking back pay under the conventional civil rights statutes such as 42 USC 1981 and 1983, the law is not clear. Some cases hold that the right does not exist.[60] One case holds that there is no right to a jury trial in an action against the Board for back pay, but that the right does exist in a suit against the board members individually.[61] It is submitted that language in *Curtis v. Loether, supra*, supports the right of a jury trial in a Section 1981 or 1983 case.[62]

VICARIOUS LIABILITY

Generally, the doctrine of vicarious liability does not apply to civil rights actions, in the sense of rendering a public official liable for the acts of his subordinates.[63] The superior would be liable where he had actual knowledge of the violation and acquiesced therein,[64] or where there is seen to be some causal connection between the supervisory defendant's actions and the constitutional deprivation.[65] Federal principles, and not the state laws of agency, govern vicarious liability in federal actions.[66]

POSSIBLE EXTENSION OF ABSOLUTE IMMUNITY TO SCHOOL BOARDS

It is anomalous that judges, who not only have a greater knowledge of law and who have comparatively unlimited time to research, study and reflect on such questions, enjoy an absolute immunity, whereas school boards, who have no such knowledge and often have to make quick decisions, have only a limited immunity.

However, two recent decisions of the Supreme Court offer the promise, at least, of an extension of absolute immunity to school boards in the exercise of their two most often used powers, legislative and quasi-judicial.

In *Lake Country Estates v. Tahoe Regional Planning Agency,*[67] the Supreme Court held that the Tahoe Regional Planning Agency, an entity created by compact between California and Nevada, is entitled to the same absolute immunity, with respect to the exercise of its legislative or rule-making powers, which would be enjoyed by state legislators. Arguably, the same reasoning should apply to public school boards, although the Court expressly reserved judgment on the question as to whether the rule applied to local legislative officials.[68]

In *Butz v. Economou,*[69] the Court held that the absolute immunity accorded judges also applied to federal hearing examiners, when acting in their official hearing capacities, the Court declaring:

> "We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages. • • • Moreover, federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. See 5 USC §555(b) (1976 ed) [5 USC §555(b)]. They are conducted before a trier of fact insulated from political influence. See §554(d). A party is entitled to present his case by oral or documentary evidence, §556(d), and the transcript of testimony and exhibits together with the pleadings constitutes the exclusive record for decision. §556(e). The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record. §557(c).
>
> There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is 'functonally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial

judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. See §556(c)."

When a school board adopts a policy to govern future transactions, it is doing the same thing that a state legislature does, and when it conducts a hearing on a teacher dismissal or student expulsion matter, it is performing the same function as a court. It is therefore reasonable to conclude, in the light of the *Tahoe Regional Planning Agency* and *Butz* cases, that boards should enjoy the same immunity. These contentions should be urged in appropriate cases.

STATE LAW CLAIMS

Federal constitutional and statutory damage actions are not the only claims with which school boards must be concerned. Boards must also contend with state laws governing negligence and libel. Two recent decisions by Georgia courts will illustrate this fact.

In *Melton v. Bow*,[70] a professor at the University of Georgia accused a student-employee of theft of hotplates from the chemistry laboratory, called him a liar, and stated that he was in trouble with IRS. The student sued the professor for libel, and a jury awarded him $200,000, and the verdict was upheld on appeal.

In *Webb v. Hennessy*,[71] the principal of a public high school was sued by a student who was injured while falling "through or into a door" at the school. The complaint alleged that the principal had legal custody and control of the premises, and was therefore guilty of negligence in maintaining the school building in permitting a rug and mat to be placed at the door. The Georgia Court of Appeals held that the complaint stated a claim, and that the principal was not protected by any immunity, disregarding prior decisions,[72] recognizing a limited immunity of school officials with respect to negligence claims by students. The Supreme Court of Georgia granted certiorari, and reversed on February 27, 1980.[73] The Supreme Court held that immunity applied because the principal was acting in an area where he was "vested with discretion and empowered to exercise judgment in matters before (him)," the duties were not ministerial in nature, and there was no allegation that he acted wilfully, wantonly or outside the scope of his authority.

In connection with defamation actions it is important to realize that a separate, independent privilege usually exists under the laws of most states:

"It is well accepted that officers and faculty members of educational organizations enjoy a qualified privilege to discuss the qualifications and character of fellow officers and faculty members, if the matter communicated is pertinent to the functioning of the educational institution. Concomitantly we believe the privilege extends to internal records in which such matters are discussed or recorded. For a plaintiff to overcome the privilege he must prove that a publication occurred outside normal channels or that the normal manner of handling such information resulted in an unreasonable degree of publication in light of the purposes of the privilege or that publication was made with malicious intent. Since no evidence was introduced tending to overcome the qualified privilege, a directed verdict was proper as to defamation and punitive damages."[74]

POINTERS IN AVOIDING LIABILITY

- **Provide Notice and Hearing**

Since a majority of the claims against school boards usually involve procedural due process denials, school boards should be careful to see that any action they take involving such matters as teacher discharge or non-renewal and student suspension is taken only after the notice and hearing required under controlling decisions have been provided. In case of doubt, it is usually better to afford more process than is due. The law is so well settled by now on most due process questions as to preclude the immunity defense in a great majority of the factual situations likely to arise.

- **Censorship – Move with Caution**

Any type of school censorship of student publications or other regulation of teacher or student free speech or association is suspect, and should be resorted to only when necessary, after consultation with a school board attorney having knowledge of First Amendment campus principles, and under a narrowly and carefully drawn regulation.

- **Maternity Leave Policies – Move with Caution**

Maternity leave policies are also suspect, under Supreme Court decisions, and federal law, 42 USC 2000e (k), and should be carefully reviewed by the school board attorney.

- **Seek Formal Advice of Counsel in Advance**

Before taking any action adversely affecting any individual, seek the advice of the school board attorney. This should be done in a formal manner prior to the school board meeting at which the action is to be taken. A spur-of-the-moment inquiry is not likely to be treated as sufficient under decisions recognizing a qualified immunity for action taken on the advice of counsel.

- **State Grounds for Dismissal at the Outset**

In teacher dismissal and non-renewal cases, school administrators and school boards should assert at the outset all the grounds relied on. Often, a school principal will assert vague, mild grounds to support his decision to cover up a more serious ground in order to save embarrassment. At the hearing, it then develops that the real reason was not as claimed, and this tends to discredit the administration, establish bad faith, and invite a damage claim.

- **When Sued – Show Evidence of Good Faith**

Where suit is brought, in order to satisfy the subjective part of the *Wood* immunity principle, board members should testify that they did not act out of malice or ill will toward the plaintiff, and endeavor to support this by other evidence.

- **When Sued – Decide Early Whether to Demand a Jury**

Where suit is brought in federal court, keep in mind that in most cases, there is a right to a jury trial, but that right must be claimed by a written demand at an early date under Rule 38(b) of the Federal Rules of Civil Procedure. Even where equitable relief is sought, the defendant is entitled to a jury trial on the damage claim, and it should be tried first.[75] A tactical decision must be made as to whether the school board members would fare better before a jury or the judge.

- **Seek Passage of Laws Authorizing Liability Insurance**

Consideration should be given to enactment of a statute such as one passed by the General Assembly of Georgia in 1973,[76] at the urging of Georgia School Boards Association, authorizing school boards to purchase policies of liability insurance insuring board members and school officials from individual liability for damages. This section provides:

"In addition to other compensation paid to members of the State Board of Education, the State Superintendent of Schools, employees of the State Board of Education, and to members of boards of education, superintendents, teachers, principals, officers and employees of boards of control of cooperative educational service agencies, and other administrators and employees of county and other local public school systems, the State Board of Education, the boards of control of cooperative educational service agencies and the several boards of education of counties, cities and independent school systems, whenever created, are hereby authorized, in their discretion, to purchase policies of liability insurance or contracts of indemnity insuring or indemnifying the members of the State Board of Education, State Superintendent of Schools, employees of the State Board of Education, officers and employees of boards of control of cooperative educational service agencies and the members of the boards of education, superintendents, teachers, principals, and other administrators and employees against damages arising out of the performance of their duties or in any way connected therewith, whether based upon negligence, violation of contract rights, or violation of civil, constitutional, common law or other statutory rights, whether State, Federal or both. Such boards may expend State, county, Federal and local funds, or any combination thereof, for such purposes. The amount of such insurance or indemnity shall be in the discretion of the respective board. No action shall be maintained against the person or company issuing such insurance or contracting for such indemnity until final judgment has first been entered against the individual covered by such policy or contract, and the existence of such insurance or indemnity shall not be disclosed nor suggested in any action brought against such individual."

Other provisions declare that the statute shall not be construed as waiving any immunity otherwise existing (§32-851); that the board may also pay for the defense of such actions (§32-852) and pay the deductible part in certain instances. (§32-852.1).

FOOTNOTES

[1] Hoffman v. Board of Education, 410 N.Y.S. 2d 99 (1978), rev'd. 49 N.Y.2d 121, 424 N.Y.S.2d 376 (1979); Donohue v. Copiague School District, 47 N.Y.2d 440, 418 N.Y.S.2d 375, 391 N.E.2d 1352 (1979).

[2] Leite v. City of Providence, 463 F. Supp. 585, 47 L.W. 2452 (D.C. R.I. 1978); Boyard v. Cook, 586 F2d 399 (C.A. 5th 1978), and compare Procunier v. Navarette, 434 U.S. 555, 566 (1978).

[3] Wood v. Strickland, 420 U.S. 308 (1975).

[4] Webb v. Hennessy, 150 Ga. App. 326, 257 S.E.2d 315 (1979), reversed, 245 Ga. 329, 264 S.E.2d 878 (1980), McManis, Personal Liability of State Officials Under State and Federal Law, 9 Ga. L. Rev. 821 (1975).

[5] 3 Am. Jur. 2d 658, §300, and see Ga. Code Ann., §4-409.

[6] 1 Cowp. 161, 175 (1744).

[7] Bradley v. Fisher, 13 Wall 335, 347 (1872).

[8] Stump v. Sparkman, 435 U.S. 349, 356 (1978).

[9] Imbler v. Pachtman, 424 U.S. 409 (1976).

[10] Pierson v. Ray, 386 U.S. 547, 554 (1967).

[11] Id., at p. 555.

[12] Barr v. Matteo, 360 U.S. 564, 574 (1959) (Four Justices, with one Justice concurring in result).

[13] Butz v. Economou, 438 U.S. 478, 507 (1978). This case upheld an absolute privilege, however, for federal hearing examiners, agency officials who have the responsibility and discretion to decide whether to initiate charges, and the agency attorney who presents evidence in a hearing.

[14] 341 U.S. 367 (1951).

[15] Pierson v. Ray, supra; Stump v. Sparkman, supra.

[16] Imbler v. Pachtman, 424 U.S. 409 (1976).

[17] 416 U.S. 232 (1974).

[18] 416 U.S. at 247-8.

[19] 420 U.S. 308 (1975).

[20] On remand, the Court of Appeals held that procedural due process had been violated, and remanded for the district court to consider the issue of immunity on the original record. Strickland v. Inlow, 519 F2d 744 (C.A. 8th 1975).

[21] 434 U.S. 555, 562 (1978).

[22] The terms "objective" and "subjective" were not used by the Supreme Court, but have appeared in lower federal court decisions. See Cruz v. Beto, 603 F2d 1178 (C.A. 5th 1979); Eckerd v. Indian River School District, 475 F. Supp. 1350 (D.C. Del. 1979); McNamara v. Moody, 606 F2d 621 (C.A. 5th 1979).

[23] 434 U.S. at 562. See also Fujiwara v. Clark, 477 F. Supp. 822 (D.C. Haw. 1979), where all 3 components of the first branch of the Wood test were applied.

[24] See, e.g., Schiff v. Williams, 519 F2d 257 (C.A. 5th 1975).

[25] 434 U.S. at 566.

[26] Bogard v. Cook, 586 F2d 399 (C.A. 5th 1978).

[27] Eckerd v. Indian River School District, 475 F. Supp. 1350 (D.C. Del. 1979); Fujiwara v. Clark, 477 F. Supp. 822 (D.C. Haw. 1979); Burt v. Board of Trustees of Edgefield City School District, 521 F2d 1201 (C.A. 4th 1975).

[28] Cruz v. Beto, 603 F2d 1178 (C.A. 5th 1979).

[29] Gomez v. Toledo, U.S. , 48 LW 4600 (1980).

[30] McNamara v. Moody, 606 F2d 621 (C.A. 5th 1979).

[31] Bryan v. Jones, 519 F2d 144 (C.A. 5th 1975).

[32] M.M. v. Anker, 477 F. Supp. 837 (D.C. N.Y. 1979), aff'd 607 F2d 588 (C.A. 2nd 1979).

[33] Monell v. New York City Department of Social Services, 436 U.S. 658, 690, 56 L.Ed.2d 611 (1978), f.n. 55.
[34] 365 U.S. 167, 5 L.Ed.2d 492 (1961).
[35] 436 U.S. 658, 56 L.Ed.2d 611 (1978).
[36] 436 U.S. at 690-691. On the other hand, the Court noted that "policy" need not necessarily be one formally adopted.
[37] Owen v. City of Independence, 100 S.Ct (1980) 1398.
[38] ___ U.S. ___, 48 LW 4859 (1980).
[39] ___ U.S. ___, 48 LW 4891 (1980).
[40] 444 F. Supp. 812 (D.C. Tex. 1977).
[41] 427 U.S. 347 (1976). Patronage dismissals have been even further restricted by the Court's decision in Branti v. Finkel, ___ U.S. ___, 48 LW 4331 (1980).
[42] Strickland v. Inlow, 519 F2d 744 (C.A. 8th 1975).
[43] 429 F. Supp. 890 (D.C. Wyo. 1977).
[44] 519 F2d 257 (C.A. 5th 1975).
[45] 475 F. Supp. 1350 (D.C. Del. 1979).
[46] 477 F. Supp. 837 (D.C. N.Y. 1979), aff'd. 607 F2d 588 (C.A. 2nd 1979).
[47] 588 F2d 246 (C.A. 8th 1978).
[48] 522 F2d 1171 (C.A. 10th 1975).
[49] Fujiwara v. Clark, 477 F. Supp. 822 (D.C. Haw. 1979).
[50] Zoll v. Eastern Allamakee School District, supra; Shirley v. Chagrin Falls Board of Education, 521 F2d 1329 (C.A. 6th 1975).
[51] Burt v. Board of Trustees of Edgefield City School District, 521 F2d 1201 (C.A. 4th 1975).
[52] Hutto v. Finney, 437 U.S. 678, 57 L.Ed.2d 522 (1978); McNamara v. Moody, 606 F2d 621 (C.A. 5th 1979). Attorney's fees are recoverable under the Civil Rights Attorney's Fees Awards Act of 1976, 42 USC 1988, and §718 of the Emergency School Aid Act, 20 USC 1617.
[53] Paul v. Davis, 424 U.S. 692 (1976).
[54] Carey v. Piphus, 435 U.S. 247 (1978).
[55] Cannon v. University of Chicago, 441 U.S. 677, 60 L.Ed.2d 560 (1979).
[56] Compare Lau v. Nichols, 414 U.S. 563 (1974), and Regents of the University of California v. Bakke, 438 U.S. 265, 412 (1978), (Opinion of 4 Justices); NAACP v. Medical Center, ___ F2d ___, 47 LW 2811 (C.A. 3rd 1979).
[57] Southeastern Community College v. Davis, 442 U.S. 397, 60 L.Ed.2d 980 (1979), f.n. 5. Some courts upheld a private action. See Chaplin v. Consolidated Edison Co., 482 F. Supp.1165, 48 LW 2541 (D.C. N.Y. 1980); Miener v. Missouri, ___ F. Supp. ___, 48 LW 2522 (D.C. Mo. 1980); Patton v. Dumpson, ___ F. Supp. ___, 48 LW 2523 (D.C. N.Y. 1980); Sherry v. New York State Educational Dept., 479 F. Supp. 1328 (D.C. N.Y. 1979).
[58] Curtis v. Loether, 415 U.S. 189 (1974); Burt v. Board of Trustees of Edgefield City School District, 521 F2d 1201 (C.A. 4th 1975); Drone v. Hutto, 565 F2d 543 (C.A. 8th 1977).
[59] Curtis v. Loether, supra, 415 U.S. at 196; EEOC v. Detroit Edison Co., 515 F2d 301, 308 (C.A. 6th 1975); Johnson v. Ga. Highway Express, Inc., 417 F2d 1122, 1125 (C.A. 5th 1969).
[60] Lynch v. Pan American Airways, 475 F2d 764 (C.A. 5th 1973); Grimes v. Pitney-Bowes, Inc., 480 F. Supp. 1381 (D.C. Ga. 1979).
[61] Burt v. Board of Trustees of Edgefield City School District, supra.

[62] See 415 U.S. 196-7.
[63] Walker v. University of Pittsburg, 457 F. Supp. 1000 (D.C. Pa. 1978); Ford v. Byrd, 544 F2d 194 (C.A. 5th 1976); Baskin v. Parker, 602 F2d 1205, 48 L.W. 2258 (C.A. 5th 1979).
[64] Walker v. University of Pittsburg, supra.
[65] Sims v. Adams, 537 F2d 829 (C.A. 5th 1976).
[66] Baskin v. Parker, supra.
[67] 440 U.S. 391, 59 L.Ed.2d 401 (1979).
[68] f.n. 26
[69] 438 U.S. 478, 512-513 (1978).
[70] 145 Ga. App. 272, 243 S.E.2d 590 (1978), aff'd. 241 Ga. 629, 247 S.E.2d 100 (1978), cert. den. 439 U.S. 985 (1978).
[71] 150 Ga. App. 326, 257 S.Ed.2d 315 (1979).
[72] Hale v. Davies, 86 Ga. App. 126, 70 S.E.2d 923 (1952) - coach not liable for injuries received by student in football practice in absence of a willful or felonious tort; Board of Education of Waycross v. Bates, 114 Ga. App. 343, 151 S.E. 2d 524 (1966).
[73] Hennessy v. Webb, 245 Ga. 329, 264 S.Ed.2d 878 (1980).
[74] Greenya v. George Washington University, 512 F2d 556 (C.A. D.C. 1975); Land v. Delta Airlines, 147 Ga. App. 738, 250 S.Ed.2d 188 (1978).
[75] Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).
[76] Ga. Laws 1973 Vol. I, p. 1267, as amended, Ga. Code Ann. §32-850 et seq.

About NSBA...

The National School Boards Association, headquartered in Washington, D.C., is a not-for-profit organization whose primary mission is the general advancement of education through the unique American tradition of local citizen control. In this way, public elementary and secondary school policy is determined by local school board members, the vast majority of whom are elected and are directly accountable to the community. NSBA promotes high quality education through services to state associations of local school boards and to local school boards, by serving as a liaison with other education organizations and governmental authorities, and by increasing school board impact on federal education laws and regulations and in court cases relating to education.

Active Members of NSBA are the 49 state associations of local school boards, the Hawaii State Board of Education, plus the boards of education in the District of Columbia and the Virgin Islands. Nearly 1,350 local school boards are NSBA Direct Affiliates.

NSBA represents about 95,000 of the nation's school board members who, in turn, represent more than 97 per cent of all public school children in the United States.

NSBA policy is determined by a 132-member Delegate Assembly composed of active school board members from across the country. Translating this policy into action is a Board of Directors consisting of 20 members. The Executive Director administers NSBA programs, assisted by a 95-member staff, headquartered in Washington, D.C.